defer action until the judicial proceeding is final. The committee recognized the soundness of this course of action when it reported House Resolution 46 (94th Cong. 1st Sess., H. Rept. No. 94–76) adopting rule XLIII, paragraph 10.

In its report, the committee stated it would act "where an allegation is that one has abused his direct representational or legislative position—or his 'official conduct' has been questioned"—but where the allegation involves a violation of statutory law, and the charges are being expeditiously acted upon by the appropriate authorities, the policy has been to defer action until the judicial proceedings have run their course.

A "crime," as defined by statutory law, can cover a broad spectrum of behavior, for which the sanction may vary. Due to the divergence between criminal codes, and the judgmental classification of crimes into misdemeanors and felonies, no clear-cut rule can be stated that conviction for a particular crime is a breach of "official conduct." Therefore, rather than specify certain crimes as rendering a Member unfit to serve in the House, the committee believes it necessary to consider each case on facts alone.

Due process demands that an accused be afforded recognized safeguards which influence the judicial proceedings from its inception through final appeal. Although the presumption of innocence is lost upon conviction, the House could find itself in an extremely untenable position of having punished a Member for an act which legally did not occur if the conviction is reversed or remanded upon appeal.

Such is the case of Representative Hinshaw. The charges against him stem from acts taken while county assessor, and allege bribery as defined by California statute. The committee, while not taking a position on the merits of this case, concludes that no action should be taken at this time. We cannot recommend that the House risk placing itself in a constitutional dilemma for which there is no apparent solution.

We further realize that resolution of the appeal may extend beyond the adjournment sine die of the 94th Congress. In fact, no future action may be required since Representative Hinshaw's electorate chose not to renominate him and he has stated, in writing, that he will resign if the appeal goes against him.

This committee cannot be indifferent to the presence of a convicted person in the House of Representatives; it will not be so. The course of action we recommend will uphold the integrity of the House while affording respect to the rights of the Member accused. We recognize that under another set of circumstances other courses of action may be in order; but, in the matter of Representative Andrew Hinshaw, we believe we have met the challenge and our recommendation is well founded.

When House Resolution 1392 was called up as privileged on Oct. 1, 1976, by its sponsor, Mr. Charles E. Wiggins, of California, it was laid on the table without debate.

§ 14. Exclusion

The power of the House to exclude a Member rests upon Article

I, section 5, clause 1 of the Constitution, which provides: "Each House shall be the judge of the elections, returns, and qualifications of its own Members. . . ." The qualifications referred to are those set forth in Article I, section 2, clause 2, of the Constitution, "No person shall be a Representative who shall not have attained to the age of twenty-five years, and have been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen." (16) Neither the Congress nor the House can add to these qualifications, nor can a state.(17)

A Member-elect may be excluded from the House pending an investigation as to his initial and final right to the seat.(18) And although a two-thirds vote is required to expel a Member, only a majority is required to exclude a Member who has been permitted to take the oath of office pending a final determination by the House of his right to the seat.(19) The vote necessary to exclude on the ground of failure to meet one of the constitutional qualifications is a majority of those voting, a quorum being present, regardless of whether a final determination by the House of a Member's right to a seat has been made.(20) A vote on an amendment in the nature of a substitute proposing exclusion is not a vote to expel, and therefore does not require a two-thirds vote of the Members present.(1)

A resolution proposing the exclusion of a Member-elect presents

16. *Powell* v *McCormack,* 395 U.S. 486 (1969). See also § 12, supra.

17. See *Powell* v McCormack, 395 U.S. 486 (1969); *Hellman* v *Collier,* 217 Md. 93, 141 A.2d 908 (1958); *Richardson* v *Hare,* 381 Mich. 304, 160 N.W. 2d 883 (1968); *State ex rel. Chavez* v *Evans,* 29 N. M. 578, 446 P.2d 445 (1968). And see H. REPT. No. 90–27, 90th Cong. 1st Sess., "In Re Adam Clayton Powell, Report of Select Committee Pursuant to H. Res. 1" (1967) p. 30.

18. 113 CONG. REC. 24–26, 90th Cong. 1st Sess., Jan. 10, 1967 [H. Res. 1, relating to the right of Adam Clayton Powell to take the oath].

19. 113 CONG. REC. 17, 90th Cong. 1st Sess., Jan. 10, 1967.

20. See the ruling by Speaker John W. McCormack (Mass.), 113 CONG. REC. 17, 90th Cong. 1st Sess., Jan. 10, 1967; see also 1 Hinds' Precedents §§ 420, 429, 434.

1. See 113 CONG. REC. 5020 90th Cong. 1st Sess., Mar. 1, 1967.

Parliamentarian's Note: In the *Powell* case the Speaker responded to a parliamentary inquiry as to the vote required on an amendment in the nature of a substitute proposing exclusion, stating that only a majority vote was required to adopt the amendment, but the Speaker was not called upon to rule whether the resolution as so amended would likewise require only a majority vote.

a question of privilege.[2] Debate thereon is under the hour rule.[3] A Member-elect has been permitted by unanimous consent to address the House during the debate on the question of whether he should be sworn in.[4]

The House has authorized its committee to take testimony in a case where the qualifications of a Member were in issue.[5] Beginning in the 94th Congress, the Committee on House Administration was granted general subpena authority in all matters within its jurisdiction. Furthermore, a committee investigating the qualifications of a Member-elect may allow his presence and permit suggestions from him during the discussion of the plan and scope of the inquiry.[6] It may also give him the opportunity to testify in his own behalf and to be present and to cross-examine witnesses.[7]

Exclusion of Adam Clayton Powell

§ 14.1 The House adopted a resolution referring to a select committee questions as to the right of a Member-elect to be sworn and to take his seat, permitting him the pay and allowances of the office pending a final determination by the House and requiring the committee to report back to the House within a prescribed time.[8] Subsequently, the House agreed to a resolution excluding him from membership on the ground, among others, that he had wrongfully diverted House funds to his own use. However, the U.S. Supreme Court ruled that a Member-elect can be excluded from the House only for a failure to meet the constitutional qualifications of age, citizenship, and inhabitancy.

On Mar. 1, 1967, the House agreed to a resolution excluding Member-elect Adam Clayton Powell, from the House, on the ground, among others, that he had wrongfully diverted House funds to his own use.[9]

2. See 3 Hinds' Precedents § 2594.

3. See 113 CONG. REC. 15, 90th Cong. 1st Sess., Jan. 10, 1967.

4. 113 CONG. REC. 15, 90th Cong. 1st Sess., Jan. 10, 1967. See also 1 Hinds' Precedents § 474.

5. 1 Hinds' Precedents § 427.

6. 1 Hinds' Precedents § 420.

7. 1 Hinds' Precedents §§ 420, 475.

8. 113 CONG. REC. 24–26, 90th Cong. 1st Sess., Jan. 10, 1967 [H. Res. 1, relating to the right of Adam Clayton Powell (N.Y.) to take his seat].

9. See H. REPT. NO. 90–27, 90th Cong. 1st Sess. (1967), "In Re Adam Clayton Powell, Report of Select Com-

On Mar. 9, 1967, Mr. Powell filed suit in the U.S. District Court, District of Columbia, asking (*inter alia*) that the Speaker and other defendants be enjoined from enforcing the resolution by which he was excluded from the House, and seeking a writ of mandamus directing the Speaker to administer him the oath of office as a Member of the 90th Congress.(10)

The action was dismissed by the district court for want of jurisdiction and by the court of appeals for lack of justiciability.(11) The Supreme Court reviewed the two lower court opinions, holding that the courts had jurisdiction, that the issue was justiciable, and that

mittee Pursuant to H. Res. 1," p. 33; see also H. Res. 278, 90th Cong. 1st Sess., 113 CONG. REC. 4997, Mar. 1, 1967. The motion for the previous question on this resolution containing the select committee recommendation was defeated (113 CONG. REC. 5020), and an amendment in the nature of a substitute excluding the Member-elect was proposed and adopted (113 CONG. REC. 5037, 5038).

10. 113 CONG. REC. 6035–42, 6048, 90th Cong. 1st Sess., Mar. 9, 1967. Mr. Powell had been requested to stand aside on the opening day of the Congress. He was not sworn in, but instead a resolution was adopted referring the question of his prima facie and his final right to a seat to a select committee [H. Res. 1, 90th Cong. 1st Sess., Jan. 10, 1967, 113 CONG. REC. 26, 27]. The House, on Mar. 1, 1967, defeated a motion for the previous question relating to the select committee resolution [H. Res. 278] which would have admitted the Member-elect as having met the constitutional qualifications of age, citizenship, and inhabitancy, but would have provided that (1) Mr. Powell be censured, (2) that he be fined $1,000 a month from his salary until $40,000 of misused funds had been paid back, and (3) that his seniority would commence as from the day he took the oath as a Member of the 90th Congress. 113 CONG. REC. 4998 et seq.

A point of order that a substitute amendment providing for the exclusion by the House of Member-elect Adam Clayton Powell would forbid the Member-elect from serving in the Senate during the 90th Congress, a power said to be beyond that of the House, and that it would forbid a later voting of the Member-elect if he were elected to fill the vacancy caused by his own exclusion, another power beyond the House, was overruled by the Chair as having been made too late in the proceedings. 113 CONG. REC. 5037, 90th Cong. 1st Sess., Mar. 1, 1967.

11. In the suit, *Powell* v *McCormack*, 266 F Supp 354 (D.C., D.C. 1967), the district court granted a motion to dismiss for want of jurisdiction. On appeal to the United States Court of Appeals for the District of Columbia, the judgment was affirmed on grounds of lack of justiciability, *Powell* v *McCormack*, 395 F2d 577 (C.A.D.C. 1968).

the power of the House under the U.S. Constitution in judging the qualifications of its Members was limited to the qualifications of age, citizenship, and inhabitancy, as set forth in article I, section 2, clause 2.[12]

On May 1, 1967, the Speaker laid before the House a letter from the Clerk advising receipt of a certificate showing the election of Mr. Powell to fill the vacancy created when the House excluded Mr. Powell from membership and declared his seat vacant. Mr. Powell did not appear to claim the seat.[13]

Effect of Felony Conviction

§ 14.2 The Speaker was authorized to administer the oath of office to a Member-elect whose right to a seat in the House was challenged on the ground that he had forfeited his rights as a citizen by reason of conviction of a felony.

On Mar. 9, 1933, at the convening of the 73d Congress, the Speaker[14] was authorized, by resolution,[15] to administer the oath of office to a Member-elect whose right to a seat in the House was questioned by a Member who asserted that the Member-elect had forfeited his rights as a citizen by reason of conviction of a felony.

Member-elect Francis H. Shoemaker, of Minnesota, was asked to stand aside during the swearing in after a resolution was offered by Mr. Albert E. Carter, of California, providing that the prima facie and final right to a seat for Mr. Shoemaker be referred to the Committee on Elections No. 1.[16]

Mr. Shoemaker had been convicted in a federal district court in Minnesota in 1930 of an offense involving the mailing of defamatory literature, and had been put on probation for five years. After a verbal altercation with the judge, he was sentenced to imprisonment for a year and a day. He served the sentence in the federal penitentiary in Leavenworth, Kansas, prior to his election to the House in 1932.[17]

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12. *Powell* v *McCormack,* 395 U.S. 486 (1969).

13. In response to a parliamentary inquiry, the Speaker indicated that if Mr. Powell appeared to take the oath and was again challenged, the House would have to determine at that time what action it should take. 113 CONG. REC. 11298, 90th Cong. 1st Sess., May 1, 1967.

14. Henry T. Rainey (Ill.).

15. 77 CONG. REC. 139, 73d Cong. 1st Sess. [H. Res. 6].

16. 77 CONG. REC. 71, 73, 73d Cong. 1st Sess.

17. *Id.* at pp. 74, 132, 133, 135.

It was alleged that under the constitution of Minnesota, Mr. Shoemaker, after the felony conviction, had become ineligible to vote or hold any office. Nevertheless, it was pointed out that he had voted in the 1932 election, had run for federal office, and that the state could not disqualify him in the latter capacity.(18)

On Mar. 10, 1933, Mr. Paul J. Kvale, of Minnesota, offered an amendment in the nature of a substitute providing that the Speaker be authorized and directed to administer the oath to Mr. Shoemaker and that the question of his final right to a seat be referred to the Committee on Elections No. 2. Debate ensued as to the responsibility of the House to bar the Member-elect at the door before giving him a hearing, as some precedents of the House suggested, or to follow other precedents and administer the oath initially and then, at a later date, consider his final right to a seat.

At the conclusion of debate the amendment was adopted on a division vote, 230 to 75.(19) The resolution as amended was agreed to, and its preamble, which referred to charges against Mr. Shoemaker, was stricken by unanimous consent.(20)

18. *Id.* at p. 74.

19. *Id.* at pp. 132–139.

20. *Id.* at p. 139.

§ 15. Suspension of Privileges

At one time, the view was expressed by a select committee that the House may impose a punishment upon a Member, when appropriate, other than censure or expulsion. The select committee in the case of Adam Clayton Powell, of New York, stated:(21)

> Although rarely exercised, the power of a House to impose upon a Member punishment other than censure but short of expulsion seems established. There is little reason to believe that the framers of the Constitution, in empowering the Houses of Congress to "punish" Members for disorderly behavior and to "expel" (art. I, sec. 5, clause 2), intended to limit punishment to censure. Among the other types of punishment for disorderly behavior mentioned in the authorities are fine and suspension.
>
> In the case of Senators Tillman and McLaurin in 1902, during the 57th Congress, the Senate specifically considered the question of punishment other than expulsion or censure. The case arose on February 22, 1903, and involved a heated altercation on the floor of the Senate in which the two men came to blows. The Senate went immediately into executive session and adopted an order declaring both Senators to be in contempt of the Senate

21. H. REPT. NO. 90–27, 90th Cong. 1st Sess., 1967, "In Re Adam Clayton Powell, Report of Select Committee Pursuant to H. Res. 1," pp. 28, 29.